

Opinion No. [29-14]

October 25, 1929

TO: Office of the Attorney General of New Mexico

COUNTY OFFICERS -- Salaries not to be increased or decreased during term. § 27, Art. IV, Constitution.

OPINION

Reference is made to yours of the 23rd inst. in which you describe a situation brought about by county officers in keeping with the provisions of Chapter 69, Laws of 1927, approved March 12, 1927, drawing increased salaries from that date, thereby coming in conflict with the budget law, Chapter 138, Laws of 1925.

You ask whether or not you are within your rights in setting up suspended charges against county officials in such cases.

I am in nowise surprised at your perplexity in view of the situation here presented and which, in part at least, rose out of the several acts of the legislature as affecting county classifications and salaries without at the same time taking into consideration the budget law and the Constitution of the State of New Mexico.

Section 1 of Article X of the Constitution provides as follows:

"The Legislature shall at its first session classify the counties and fix salaries for all county officers, which shall also apply to those elected at the first election under this Constitution. And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county."

In keeping with this requirement of the constitution, the legislature, in 1915, provided classification of counties and fixed the salaries of officers and also provided by section 19, Chapter 12, Laws of 1915 for a reclassification each fourth year, such classification to be made by the State Auditor. Inasmuch as salaries of county officers depended upon the class in which a county was placed any change of classification was likely to effect such salaries by either increasing or decreasing them. In 1923 the legislature again, by Chapter 49, provided that a classification be made each second year by the State Auditor and based upon the assessed valuation as fixed for the preceding year. Further legislation has been passed governing this subject in 1927 Chapter 69 and in 1929 Chapter 99.

An act providing for county budgets and for the control of expenditures in accordance therewith was enacted as Chapter 188 and approved March 14, 1921. This act was amended in some particulars by Chapter 138, Laws of 1925, but probably not in such

way as to effect the question under consideration. The act, both as originally enacted and as amended, requires county officials to observe and be bound by the budget as certified and prohibits the several boards of County Commissioners and all other officials having the right to allow and pay claims, from allowing or approving claims in excess of such budget and prohibits County Treasurers from paying any county or other warrants in excess thereof and holds officials, so allowing or paying claims or warrants in excess of the budget, and their bondsmen liable for such excess payments. Section 7 of Chapter 188, Laws of 1921, also provides for criminal prosecution of officials who violate the provisions of the act.

Section 27 of Article IV of the Constitution is as follows:

"No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution."

This section of the constitution was before the Supreme Court of this state in the case, State ex rel Gilbert et al vs. Board of Commissioners of Sierra County, 29 N.M. 209, on the question of the constitutionality of certain sections of Chapter 49 of the laws of 1923 as applicable to salaries of officers and which salaries were either increased or diminished by the county classification provided for by that act. The question of conflict with the budget act was not considered in that case but with reference to the constitutional provisions the court said:

"The constitutional provision in question is plain and emphatic; the words used are apt, direct, and construe themselves. It positively forbids increasing or diminishing the compensation of any officer during his term of office."

The entire opinion is interesting and the authorities and citations there used; but for the purposes of this opinion it is sufficient to quote the syllabus of that case as written by the court itself and as follows:

- "1. Section 27 of article 4 of the Constitution prohibits increasing or diminishing the compensation of an officer during his term of office.
2. This prohibition applies to officers who have a definite and fixed tenure of office, and does not embrace or include those who hold their offices at the pleasure of and subject to removal by the appointing power.
3. The constitutional inhibition in question applies to all officers who hold public offices, regardless of whether such offices were created by the Constitution or the Legislature.
4. Section 2 of chapter 49, Laws of 1923, which provides that within 30 days after such act takes effect, the state auditor shall classify the several counties of the state, using therefor the assessed valuation of such counties as finally fixed for the year 1922, and

that such classification shall determine the salaries of the several county officers during the years 1923 and 1924, is void as to such officers then serving, where it results in either increasing or diminishing their compensation during their term of office."

In view of that decision it would seem that any county classification act would be held void and unconstitutional in so far as applicable to officers who have a definite and fixed tenure of office not held merely at the pleasure of the appointing power and whose compensation is either increased or diminished during the term for which elected by such classification, though the act might be given effect as to compensation of officers not coming within that class.

Since none of these county classification acts make reference to the budget law, there can be no repeal of such budget law except by implication and inasmuch as no section may be amended without a rewriting in full of such section there could be no amendment by implication: nor could a repeal be effected by a void statute.

Having reached the conclusion above stated with reference to sections of county classification acts as applicable to compensation of officers, it naturally follows that the budget law is not affected by such acts and, in so far as they are concerned, remains in full force and effect.

This then brings us to the final conclusion that you are right in setting up suspended charges in cases in which the budget has been overdrawn by increase of salary of officers during their terms of office even though in keeping with the provisions of such sections of county classification acts hereinbefore mentioned as unconstitutional.